IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:	)	Chapter 7 Case
	)	Number 97-11804
WILLIAM E. JOHNSON	)	
	)	
Debtor	)	
	)	
	)	
WILLIAM E. JOHNSON	)	FILED
	)	at 2 O'clock & 10 min. P.M.
Movant	)	Date: 2-27-98
	)	
vs.	)	
	)	
SRP FEDERAL CREDIT UNION	)	
	)	
Respondent	)	

ORDER

By motion, the debtor, William E. Johnson, seeks to avoid the lien of SRP Federal Credit Union ("SRP") in property held for personal and household use by Debtor. 11 U.S.C. § 522(f).[1] The

[1]11 U.S.C. § 522(f). Exemptions. In part applicable to the matter presented provides:
(f)(1) Notwithstanding any waiver of exemptions, but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is
(B) a nonpossessory, nonpurchase-money security interest in any
(i) household furnishings, household goods, wearing

motion is granted.

Debtor purchased a washer, dryer and refrigerator from Sears on March 30, 1996 using his Sears charge card for payment. On March 31, 1996 Debtor purchased furniture from Havertys using Visa and Mastercard credit cards and Havertys in store financing for payment. After the purchases, Debtor went to SRP for a loan with a lower interest rate for the debt incurred for these purchases and received a loan for the amounts due on April 26, 1996. SRP sent checks directly to the creditors.

On July 15, 1997 Debtor filed this voluntary chapter 7 case. Debtor listed the furniture and appliances as exemptions in Schedule C pursuant to Georgia's exemption law O.C.G.A. § 44-13-100(a)(1) and, in an amendment to Schedule C, § 44-13-100(a)(6)[2].

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apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the person, family, or household use of the debtor or a dependent of the debtor

[2]O.C.G.A. § 44-13-100(a)(1) & (6) provides:

(a) In lieu of the exemption provided in Code Section 44-13-1, any debtor who is a natural person may exempt, pursuant to this article, for purposes of bankruptcy, the following property:
(1) The debtor's aggregate interest, not to exceed $5,000.00 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of a debtor;
. . .
(6) The debtor's aggregate interest, not to exceed $400.00 in value plus any unused amount of the exemption provided under paragraph (1) of this subsection, in any property; . . . .

In Schedule C Debtor valued the furniture and appliances at $5,400.00. On October 7, 1997 Debtor moved under 11 U.S.C. § 522(f) to avoid SRP's lien in the furniture and appliances. Debtor asserted SRP's lien to be a nonpossessory and non-purchase money security interest in property held for personal and household use of Debtor, and SRP's lien impairs Debtor's exemption under 11 U.S.C. § 522(b). SRP objected claiming an April 26, 1996 promissory note and security agreement for $14,236.78 secured by furniture and perfected by a U.C.C. 1 financing statement filed on June 12, 1996. SRP claims that the loan constitutes a purchase money security interest lien because it is a refinancing of purchase money debt. SRP does not challenge the Debtor's contention that the property is otherwise exemptible.

For resolution is whether SRP's loan 26 days after Debtor purchased the furniture and appliances from Sears and Havertys constitutes a purchase money security interest in the collateral, thus preventing the lien avoidance.

> 'To determine whether a security interest is a purchase-money security interest, the Court must look to the relevant state law.' Matter of Franklin, 75 B.R. 268, 270 (Bankr. M.D. Ga. 1986) (citing inter alia Lewis v. Manufacturing Nat'l Bank of Detroit, 364 U.S. 603, 81 S. Ct. 347, 5 L.Ed.2d 323 (1961) and Roberts Furniture Co. v. Pierce (In re Manuel), 507 F.2d 990, 992 (5th Cir. 1975).

In re Carter, 169 B.R. 227 (Bankr. M.D. Ga. 1993). Georgia law defines a "purchase money security interest."

> A security interest is a "purchase money security interest" to the extent that it is:
> (a) Taken or retained by the seller of the collateral to secure all or part of its price; or
> (b) Taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

O.C.G.A. § 11-9-107.

United States v. Hooks (Matter of Hooks), 40 B.R. 715 (Bankr. M.D. Ga. 1984) clearly sets out the standard for bankruptcy courts in Georgia to determine whether a purchase money security interest has been created.

> In North Platte State Bank v. Production Credit Association, 189 Neb. 44, 200 N.W.2d 1, 10 U.C.C. Rep. Serv. 1336 (1972), a farmer purchased cows on account and took title and possession of the cows. Two months later the farmer obtained a loan from the bank and used the proceeds to pay for the cows. At the time of the loan, the bank took a security interest in the cows. The court held that the bank's security interest was not a purchase-money security interest because the loan proceeds were not used to enable the farmer to acquire rights in the collateral. The court reasoned that since the farmer already had possession and title, he already had all the rights he could possibly acquire in the collateral through the use of the bank's money.
> In B. Clark, The Law of Secured Transactions Under the Uniform Commercial Code § 3.9[2] (1980), the author explains the North Platt

> decision: 'The court felt that the advance merely enabled the debtor to pay a debt. However, if facts can be developed that show a closer nexus between the original open account sale and the later bank financing, the bank would have a stronger argument. If Supplier in the example above had contemplated bank financing as necessary to 'take out' the open account, Bank should be given purchase money priority. The test should be whether the availability of a direct loan take-out was a factor in negotiating the original sale. The fact that the transaction required two steps should not be fatal, so long as both steps were contemplated as part of a single financing arrangement.'
>
> One of the drafters of the Uniform Commercial Code also has suggested that a lender could acquire a purchase-money security interest although the borrower first acquires the goods and then makes payment with the borrower's funds: 'If the loan transaction appears to be closely allied to the purchase transaction, that should suffice. The evident intent of paragraph (b) is to free the purchase-money concept from artificial limitations; rigid adherence to particular formalities and sequences should not be required.' 2 G. Gilmore, Security Interests in Personal Property 782 (1965).

Matter of Hooks, 40 B.R. at 720-21.

While artificial limitations and rigid formalities and sequences should not be imposed on the transaction, a close alliance between the loan and the initial sale must exist, which SRP has not shown. Miles v. First Family Fin. Serv. of Georgia, Inc. (In re Miles), Chp. 7 Case No. 92-11035 slip op. at p. 4 (Bankr. S.D. Ga. December 30, 1992 Dalis, J.) (Objecting creditor bears the burden to

prove the exemption is not properly claimed.) See In re Gonzales, 206 B.R. 133 (Bankr. N.D. Tex. 1997) (in debtor's motion to avoid lien under § 522(f)(1)(B) for furniture claimed by debtor as exempt, the creditor bears the burden of showing a purchase money security interest exists and the extent of that interest, and failure to do so entitles the debtor to avoid the lien); In re Maylin, 155 B.R. 605 (Bankr. D. Me. 1993) (once debtor establishes entitlement to an exemption, the burden shifts to creditor challenging the exemption as part of the § 522(f) defense to prove the exemption claim is not proper). But see In re Kerbs, 207 B.R. 211 (Bankr. D. Mont. 1997) (on debtor's motion to avoid lien pursuant to 522(f) moving party bears burden of proof on all avoidance issues); Matter of Carter, 180 B.R. 321 (Bankr. M.D. Ga. 1995) (burden on debtor to show statutory requirements for avoidance satisfied under § 522(f)). Federal Rule of Bankruptcy Procedure 4003(c) & (d)[3]. SRP loan proceeds were not used to enable Debtor to acquire the rights in the collateral. Debtor had possession, title and all interest in the

[3]Federal Rule of Bankruptcy Procedure 4003(c) & (d) provides:

(c) Burden of Proof. In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on notice, the court shall determine the issues presented by the objections.

(d) Avoidance by Debtor of Transfers of Exempt Property. A proceeding by the debtor to avoid a lien or other transfer of property exempt under § 522(f) of the Code shall be by motion in accordance with Rule 9014.

property prior to receiving SRP's loan. Neither the Debtor nor Havertys or Sears contemplated, from the facts provided at hearing, that SRP's financing was necessary for the sale of the furniture and appliances to go through. SRP's loan was not a factor or a step contemplated in the negotiation of the

original sale. SRP does not hold a purchase money security interest in the collateral.

It is therefore ORDERED that the motion of the Debtor, William E. Johnson, to avoid the nonpurchase money nonpossessory lien of SRP Federal

Credit Union in property claimed as exempt by the Debtor is granted.

JOHN S. DALIS
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 27th day of February, 1998.